

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 27, 2015**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2014AP1539  
2014AP1540  
2014AP1541**

**Cir. Ct. Nos. 2012TP241  
2012TP242  
2012TP243**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO CHRISTOPHER E.,  
A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**MICHELLE M.,**

**RESPONDENT-APPELLANT.**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO SKYLAR E.,  
A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**MICHELLE M.,**

**RESPONDENT-APPELLANT.**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO TRYSTAN E.,  
A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**MICHELLE M.,**

**RESPONDENT-APPELLANT.**

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APPEALS from orders of the circuit court for Milwaukee County:  
JOHN J. DIMOTTO, Judge. *Affirmed.*

¶1 KESSLER, J.<sup>1</sup> Michelle M. appeals orders terminating her parental rights to her three children, Christopher E., Skylar E., and Trystan E. Michelle argues that there was insufficient evidence to support a jury verdict that she failed to assume parental responsibility for her children, that the ground of failure to assume parental responsibility was unconstitutional as applied to her, and that she received ineffective assistance of counsel. We affirm.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

## **BACKGROUND**

¶2 On September 26, 2012, the State filed petitions to terminate Michelle's parental rights to her three children. The petitions alleged grounds of continuing CHIPS and failure to assume parental responsibility.

¶3 A fact-finding hearing began before a jury on October 7, 2013, where the State called multiple witnesses. Trisha Wollin, the psychotherapist treating Skylar and Christopher, testified that neither of the children discuss their biological parents often, but that both children do remember instances of domestic abuse in the home and that Christopher lacks trust for his mother. Wollin testified that Christopher in particular had multiple memories of domestic abuse between his mother and father. Wollin stated that the children were fearful of returning to Michelle's home, and that the children's development was being negatively affected by being in Michelle's home. Wollin also stated that the children would develop more appropriately if they were to remain in stable homes.

¶4 Dr. Stephen Emiley, a clinical psychologist, also testified. Dr. Emiley testified that he conducted psychological evaluations of Michelle in 1996 and 2002, after Michelle was referred for evaluations by the Bureau of Milwaukee Child Welfare. Dr. Emiley stated that at the time of Michelle's 1996 evaluation, she suffered from a personality disorder with histrionic and antisocial features. In 2002, according to Dr. Emiley, Michelle was suffering from "a bit more," including posttraumatic stress disorder, cannabis dependence, a pain disorder and psychological problems. Dr. Emiley testified that Michelle does not acknowledge having "a problem." Dr. Emiley also stated that Michelle disclaims responsibility for her children's removal from her care, consistent with her personality disorder.

¶5 Susan Dansby, a nurturing facilitator for Easter Seals, testified that she works with parents to “help them learn how to take care of themselves better so that they can then take care of their children better.” Dansby testified that she conducted multiple parenting sessions with Michelle. Dansby testified that Michelle “[doesn’t] see things the way we see it” as far as appropriate parenting is concerned.

¶6 Kim Hembrook, an employee with the Bureau of Milwaukee Child Welfare, testified that she received a referral in March 2011 to look into safety issues at Michelle’s home. Specifically, Hembrook stated that the Bureau “received a referral indicating that there was some sexual activity going on between [Michelle’s] two boys during shower time.” The referral also “referenced [Michelle] having let several necessary services terminate without rejuvenating them, or reinstating them, and related to food and medical care and things of that nature.” Hembrook stated that the boys were seven years old and four years old at that time. Hembrook testified that she contacted the boys’ school to speak with the boys, but the boys were not present. Hembrook attempted multiple times to contact Michelle, but was unable to reach Michelle, despite Michelle residing at the same address. Hembrook continued to contact the school in the following weeks, but the children had not returned to school. Hembrook received a second referral in April 2011 for “lack of supervision” after a police officer found Christopher wandering outside of his home. Finally, Hembrook was able to make contact with Michelle, after six weeks of attempts, in late April 2011. Hembrook stated that the home was in “bad condition,” as there was no heat or electricity and the refrigerator was not working. Hembrook testified that Michelle described

instances of domestic violence with the children's father that the children witnessed.

¶7 Kimberly Keegan, the former case worker who worked with Michelle and her children, testified that she obtained the children's school records and discovered that Michelle was not "getting them to school on a regular basis." Specifically, Keegan stated that Skylar had fifty-five unexcused absences during the year Keegan worked with Michelle, and that Christopher had sixty unexcused absences. Once the children were removed from Michelle's care, they attended school regularly. The children had significant behavioral issues once they returned to school full-time. Keegan further testified that Michelle started a business as a dominatrix and that she (Keegan) was concerned about the children's potential exposure to sexual behavior between Michelle and her clients. Keegan also stated that Michelle was behind on the children's medical and dental appointments and their immunizations. During the children's time in foster care, Michelle did not attend any of the children's appointments.

¶8 Kristy Baltutis, the former case manager supervisor for Michelle's case, testified that Michelle had not met the conditions for the return of her children. Baltutis stated that during a meeting with Michelle in court, Michelle became very angry and yelled loudly, drawing the attention of the sheriffs. Baltutis stated that Michelle would not meet the children's nutritional needs during her visits with them, and would discuss issues with the children she was specifically told by Bureau representatives not to discuss. Baltutis also testified that Michelle did not provide a safe living environment for the children, choosing to live in a motel, rather than working towards stable housing. Baltutis also expressed concern for the children's safety based on Michelle's care for her

(Michelle's) elderly mother. Specifically, Baltutis stated that Michelle locked her mother in her home, resulting in the involvement of adult protective services in the removal of the mother from Michelle's care. Baltutis further stated that if Michelle treated her elderly mother in such a way, she could do the same with her children. Baltutis also opined that Michelle had not met the conditions for the return of her children.

¶9 The jury found that grounds existed to terminate Michelle's parental rights to the children. A disposition hearing was held on January 8, 2014, where the circuit court entered orders terminating Michelle's rights to her three children. Michelle appealed the circuit court's order, alleging multiple instances of ineffective assistance of counsel. The matter was remanded for an evidentiary hearing, where the circuit court determined that trial counsel was not ineffective. This appeal follows.

## DISCUSSION

¶10 On appeal, Michelle contends that the State failed to prove that she failed to assume parental responsibility and that trial counsel was ineffective. We disagree.

### **I. There was Sufficient Evidence to Support the Jury's Verdict.**

¶11 A jury finding in a termination of parental rights trial will not be overturned if there is any credible evidence that, under any reasonable view, supports the verdict and removes the question from speculation. *Sheboygan Cnty. DHHS v. Julie A.B.*, 2002 WI 95, ¶27, 255 Wis. 2d 170, 648 N.W.2d 402; *see also* WIS. STAT. § 805.14(1). The evidence is viewed in the light most favorable

to the verdict. *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶39, 333 Wis. 2d 273, 797 N.W.2d 854. Failure to assume parental responsibility grounds involve consideration of the totality of the circumstances over the course of the child’s entire life. *Id.*, ¶3. Only when the evidence is inherently or patently incredible will an appellate court substitute its judgment for that of the fact-finder. *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965).

¶12 The failure to assume parental responsibility grounds are set forth in WIS. STAT. § 48.415(6)(b), which states:

FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶13 Michelle contends that the jury’s verdict was “perverse” because the State, in its closing argument, argued that Michelle exposed her children to a “hazardous” living environment. Michelle contends that this argument was not supported by the record. Michelle also contends that the “ground of failure to assume parental responsibility was unconstitutional as it applied to [her]” because

whether Michelle exposed her children to a “hazardous living environment” was not an element of WIS JI—CHILDREN 346 at the time of Michelle’s trial.<sup>2</sup> Rather, Michelle argues that the term “whether the parent exposed the child to a hazardous living environment” was added to the jury instruction in the year following Michelle’s trial and should not have been considered by the jury. She also contends that because she was a victim of domestic violence, the jury should not have been allowed to consider whether she provided a “hazardous living environment” for the children.

¶14 The instructions the circuit court provided to the jury were as follows:

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<sup>2</sup> The standard jury instruction in place at the time of Michelle’s trial, WIS JI—CHILDREN 346, stated, as relevant:

To establish a failure to assume parental responsibility, (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent or the (person) (or) (persons) who may be the parent of (child) (has) (have) not had a substantial parental relationship with (child.)

The term “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of (child). In evaluating whether (person) has had a substantial parental relationship with the child, you may consider factors, including, but not limited to, whether (person) has expressed concern for or interest in the support, care, or well-being of (child), whether (person) has neglected or refused to provide care or support for the child, and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy.

A parent’s lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility.



To establish a failure to assume parental responsibility, the State must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the mother ... [has] not had a substantial parental relationship with [the three children.]

The term “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of a child. Substantial parental responsibility ... is assessed based upon a totality of the circumstances throughout a child’s entire life. In evaluating whether the mother ... had a substantial parental relationship with [the three children], you may consider factors including, but not limited to, whether [she has] expressed concern for or interest in the support, care, or well-being of each child; whether [she has] neglected or refused to provide care or support for each child; whether [she has] exposed the children to a hazardous living environment; and all other evidence bearing on the issue of substantial parental relationship which assists you in making this determination with respect to the mother[.] You may consider the reasons for the parent’s lack of involvement when you assess all of the circumstances throughout the entire life of the children.

¶15 We reject Michelle’s arguments because they are based upon the premise that the jury *only* considered whether the children were exposed to a hazardous living situation. In assessing whether a parent failed to assume parental responsibility, a jury is to look at the totality of the circumstances and is to consider the parent’s actions, or inactions, throughout the course of the children’s lives. See *Tammy W-G.*, 333 Wis. 2d 273, ¶¶22-23. This can include, but is not limited to, whether a parent exposed his or her children to a hazardous living environment. See *id.*, ¶¶36-38. The evidence in this case showed that Michelle failed to get her children to school regularly, failed to keep up with the children’s medical and dental appointments, failed to pay the electric bills, and failed to find fault in her parenting methods. Moreover, the evidence does not suggest that Michelle failed to assume parental responsibility because she was a domestic

violence victim; rather, the evidence focused on Michelle’s actual parenting, the children’s actual conditions, and her failure to protect her children from exposure to violence. Therefore, even if the term “whether the parent exposed the child to a hazardous living environment” was not officially included in the jury instructions at the time of Michelle’s trial, the jury was not precluded from considering this factor when evaluating the totality of the circumstances. Michelle was not denied due process by the jury’s consideration of whether she exposed her children to a hazardous living environment, and the failure to assume parental responsibility ground was not unconstitutional as applied to her.

## **II. Ineffective Assistance of Counsel.**

¶16 Ineffective assistance of counsel claims in termination of parental rights proceedings are analyzed under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *Oneida Cnty. Dep’t of Soc. Servs. v. Nicole W.*, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. To show ineffective assistance of counsel, the parent must demonstrate both that trial counsel’s performance was deficient and that the deficient performance prejudiced the parent’s defense. *Strickland*, 466 U.S. at 687. Whether counsel’s actions constitute ineffective assistance presents a mixed question of fact and law. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the circuit court’s factual findings unless they are clearly erroneous. See *id.* at 634. However, whether counsel’s performance was deficient and whether the parent was prejudiced are questions of law, which we review *de novo*. See *id.*

¶17 Courts may decide ineffective assistance of counsel claims based on prejudice without considering whether counsel’s performance was deficient. *State*

*v. Roberson*, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. To show prejudice, the parent must show that counsel’s alleged errors actually had some adverse effect on the defense. *Strickland*, 466 U.S. at 693. The parent cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. *Id.* Instead, the parent must show that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

¶18 Michelle alleges over sixty instances of ineffective assistance of counsel stemming from counsel’s failure to object to information that Michelle classifies either as irrelevant or unfairly prejudicial. Assuming, without deciding, that any of Michelle’s allegations reflect deficient performance, we conclude that Michelle has not demonstrated that she was prejudiced by any of the allegations, either individually or cumulatively.

¶19 The circuit court addressed Michelle’s ineffective assistance of counsel allegations at the postdisposition hearing and acknowledged that “[w]hile some arguably objectionable evidence was heard by the jury, the relevance of which was probably outweighed by its unduly prejudicial impact, when considering the totality of the evidence presented to the jury, there is not a reasonable probability that the jury would have changed its verdict with respect to ... failure to assume grounds had the objectionable evidence been excluded.” In its thorough, well-reasoned decision, the court noted that in light of the multitude of evidence supporting the jury’s finding, Michelle was not prejudiced by her counsel’s performance. The court pointed to evidence showing: (1) that at the time of trial Michelle’s children had been out of her home for two years; (2)

Michelle did not progress from her supervised visits; (3) Michelle was offered assistance to find low-income housing, but chose to live in an unsafe motel instead; (4) Michelle demonstrated inappropriate behavior during her visits with her children; (5) Michelle did not complete the conditions of the children's return; (6) Michelle did not keep up with the children's medical appointments; and (7) Michelle did not understand her children's needs. In light of all of the evidence, we agree with the circuit court that even if the objectionable evidence had been excluded, there is no reasonable probability that the jury would have reached a different verdict.

¶20 To the extent Michelle raises issues not addressed in this opinion, we conclude that the record does not support those issues and that our resolution of the issues addressed is dispositive of this appeal. Accordingly, we affirm the circuit court.

*By the Court.*—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

